No. 20-55631

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL PORK PRODUCERS COUNCIL & AMERICAN FARM BUREAU FEDERATION,
Plaintiffs-Appellants,

v.

KAREN ROSS, *ET AL.*,
Defendants-Appellees.

&

ANIMAL LEGAL DEFENSE FUND, *ET AL.*,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of California
No. 3:19-cv-02324-W-AHG
Hon. Thomas J. Whelan

BRIEF OF INDIANA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IOWA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND INTEREST OF *AMICI* STATES

Amici curiae, the States of Indiana, Alabama, Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief in support of Plaintiffs-Appellants National Pork Producers Council and American Farm Bureau Federation.

California's Proposition 12, enacted by voters in November 2018, contains two operative provisions. The first exercises California's sovereign authority over farming in the State by regulating the manner in which California farmers may confine (1) calves raised for veal, (2) breeding pigs, and (3) egg-laying hens. Cal. Health & Safety Code § 25990(a).

The second provision, however, unconstitutionally purports to extend California's animal-confinement regulations to *every* farmer in the United States: It prohibits the sale of any veal, pork, or eggs produced from animals not raised in accordance with California rules, regardless of where those animals were raised. *Id.* § 25990(b). Worse, California has proposed regulations that would permit California officials to conduct on-site inspections in other States and would impose onerous record-keeping

requirements on out-of-state farmers. *See* Cal. Dep't of Food and Agric., Draft Art. 5. (Jul. 22, 2020), https://www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT07222020.pdf.

Amici States file this brief to explain that the Commerce Clause prohibits California's attempt to usurp other States' authority to set their own animal-husbandry policies. California's rules are a substantial departure from current practices in most States, including *Amici* States. The Commerce Clause does not permit California to upset those practices by setting a single, nationwide animal-confinement policy.

Furthermore, some of the *Amici* States, including Indiana, operate farms that sell meat on the open market. Purdue University, a body corporate and politic and an arm of the State of Indiana, raises swine and sells them into the national supply chain, likely reaching California customers. As such, the State of Indiana is likely to be one of many States directly affected by Proposition 12.

Because *Amici* States have a sovereign interest in preserving their authority to establish policy for their own farmers, they file this brief to explain why this court should reverse the district court's order and instruct it to allow the case to proceed.

SUMMARY OF THE ARGUMENT

Because the Commerce Clause vests Congress with the exclusive power to regulate *interstate* commerce, *La. Pub. Serv. Comm'n v. Tex. & N.O.R. Co.*, 284 U.S. 125, 130 (1931), it correspondingly limits the power of states "to erect barriers against interstate trade," *Maine v. Taylor*, 477 U.S. 131, 137 (1986). In order to "preserve[] a national market for goods and services," the Commerce Clause "prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n. v. Thomas*, 139 S. Ct. 2449, 2459 (2019). As the Court recently observed, this negative implication of the Commerce Clause reflects a "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization" present at the time of the Founding. *Id.* at 2461 (internal quotations omitted).

The Framers' central concern, in other words, was to prevent the interstate trade barriers—and corresponding interstate friction—that the Articles of Confederation had allowed. *See Hughes v. Oklahoma*, 441

U.S. 322, 325 (1979). "The entire Constitution was 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

The interstate trade barriers the Commerce Clause prohibits include regulations a State imposes on commerce that takes place in *other* States. This prohibition on extraterritorial regulation "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36.

Because California's Proposition 12 imposes extraterritorial regulations, it violates the Commerce Clause. Proposition 12 requires farmers across the country to raise their veal calves, hogs, and hens according to California's animal-confinement standards—or else be forced out of the California market altogether. In doing so, it attempts to establish a

national animal husbandry policy, frustrates a multi-billion dollar interstate industry, and unconstitutionally interferes with the autonomy of the States to regulate agriculture within their borders.

In dismissing the Plaintiffs' complaint, the district court failed to appreciate Proposition 12's practical effects on farm owners and operators outside of California. Proposition 12 will force both out-of-state farmers and other States to make a choice: conform to California laws or leave the California market. And this sort of single-state coercion is precisely the type of interstate trade friction the Commerce Clause was designed to prevent. Although California may serve as a laboratory of state policy experimentation with its animal confinement laws, it may not impose those same policies on extraterritorial conduct and thereby prevent other States from experimenting with their own policies for their own citizens.

This Court should therefore reverse the district court's order granting Defendants' Motion to Dismiss and Defendant-Intervenors' Motion of Judgment on the Pleadings, and allow this challenge to Proposition 12 to proceed.

ARGUMENT

I. Proposition 12 Violates the Commerce Clause Because It Imposes California's Policies on Out-of-State Conduct

In applying the Commerce Clause's prohibition on extraterritorial regulation, the Supreme Court has explained that a state legislature's power to enact laws is similar to a state court's jurisdiction to hear cases—"[i]n either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.13 (1989) (internal quotation marks and citation omitted). The Commerce Clause thus precludes "the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 336. Thus, a "state law that has the practical effect of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id.* at 332 (citation and internal quotation marks omitted).

The prohibition on extraterritorial regulation applies "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. And even a regulation that does not explicitly regulate interstate conduct may do so "nonetheless by its practical effect and design." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994). Accordingly, determining whether a state regulation constitutes prohibited extraterritorial regulation requires consideration not merely of the bare statutory text, but also of the law's "practical effect," including "the consequences of the statute itself" and how that statute may "interact with the legitimate regulatory regimes of the other States." *Id.* At 406; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–83 (1986) (holding that a State "may not project its legislation into [other States]" (internal quotation marks and citation omitted)).

In *Carbone*, for example, the Court held that an ordinance requiring all local solid waste to be processed at a local transfer station violated the Commerce Clause because it deprived out-of-state competitors of access to a market. *Id.* at 386. Though the ordinance did not regulate extrater-

ritorially on its face, the Court held that "its economic effects" were impermissibly "interstate in reach," because it "prevent[ed] everyone except the favored local operator" from processing solid waste and "thus deprive[d] out-of-state businesses of access to a local market." *Id.* at 389. The town argued that it adopted the ordinance to minimize its own environmental footprint, but the Court held that the town's motivation did not permit it to "attach restrictions to exports or imports in order to control commerce in other States" and thereby "extend the town's police power beyond its jurisdictional bounds." *Id.* at 393. "States and localities," the Court held, "may not attach restrictions to exports or imports in order to control commerce in other States." *Id.*

Accordingly, this Court has specifically held that California cannot use a ban on *in-state sales* as a method to regulate upstream, *out-of-state commercial practices* that California deems objectionable. *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018), for example, involved a California statute that required the incineration of all biohazardous medical wastes originating in California, even if the laws of another State permitted an alternative method. *Id.* at 613. This Court, citing *Healy*, examined "whether the practical effect of the regulation is to

control conduct beyond the boundaries of the state," *id.* at 614, and specifically noted that "the mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Id.* at 615. This Court concluded THAT THE STATUTE WAS AN "ATTEMPT[] TO REGULATE WASTE treatment everywhere in the country," *id.* at 616, and held that the California law thus violated the Commerce Clause.

Similarly, in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (*en banc*), this Court faced a law which required sellers of fine art to pay the artist a royalty if the artist resided in California or the sale took place in California. The case involved a challenge to the statute's first clause, with this Court reasoning that the royalty would apply to a transaction in which the art, the artist, or the buyer had no connection with California. *See id.* at 1323. Because the statute regulated wholly out-of-state sales, this Court held that it violated the Commerce Clause. *See id.* at 1324—25.

The district court failed to address either *Daniels Sharpsmart* or *Christies* and instead rested its analysis on *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015), and

Rocky Mountain Farmers Union v. Corey, 913 F.3d 940 (9th Cir. 2019). The district court read these cases to stand for the proposition that a "statute that applies both to California and out-of-state entities does not target wholly extraterritorial activity." ECF 37 at 7. But that notion mistakenly conflates the Commerce Clause's prohibition on *discriminatory* state laws with its prohibition on *extraterritorial* laws. If a law regulates wholly out-of-state conduct, it is unconstitutionally extraterritorial, even if it imposes the same restrictions on both in-state and out-of-state conduct.

In *NCAA v. Miller*, for example, this Court reversed a district court decision that rejected a Commerce Clause challenge on the ground that the statute at issue did "not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests"; this Court explained that "discrimination and economic protectionism are not the sole tests," and held that the district court "should also have considered whether the Statute directly regulates interstate commerce." 10 F.3d 633, 638 (9th Cir. 1993). Both *Daniels Sharpsmart* and *Christies* illustrate this point: The requirements in both cases—incineration of all biohazardous medical waste in *Daniels Sharpsmart* and payment of a five

percent royalty in *Christies*—applied equally to in-state and out-of-state conduct, but were struck down because they regulated conduct occurring wholly beyond California's borders.

The district court also read this Court's decisions to say that extra-territoriality analysis under the Commerce Clause should ignore the law's practical effects; yet this runs directly contrary to the Supreme Court's decisions in *Healy* and *Carbone*. As noted, both decisions specifically held that courts considering extraterritoriality challenges must consider the law's "practical effect." *Carbone*, 511 U.S. at 394; *see also Healy*, 491 U.S. at 332 ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986))).

Finally, the district court, citing *NCAA v. Miller*, suggested that Proposition 12 does not violate the extraterritoriality doctrine because it is "not directed at interstate commerce and only interstate commerce." ECF 37 at 8. This idea, of course, directly conflicts with *Daniels Sharpsmart* and *Christies*, neither of which involved statutes exclusively directed at interstate commerce. And *NCAA* itself comes nowhere near

saying this: That decision invalidated a Nevada law that required the NCAA to provide Nevada residents due-process protections during enforcement proceedings. 10 F.3d at 637. This Court held that the fact that the Nevada statute would—like the California statute at issue here—"force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules" was sufficient to render the law unconstitutionally extraterritorial. *Id.* at 639. This Court did not so much as suggest that the Nevada law's exclusive focus on interstate organizations was *necessary* to its unconstitutionality; indeed, this Court held that the law's "potential interaction or conflict with similar statutes in other jurisdictions" was an independently sufficient ground to invalidate the statute. *Id.*

In any case, the district court's reasoning—that States may impose *any* regulations on *any* out-of-state conduct so long as such regulations are nondiscriminatory and are somehow connected to in-state sales—directly contradicts not only *Daniels Sharpsmart* and *Christies* (an en banc decision of this Court), but also the approach taken by five other circuits. *See Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), *cert. denied* 139 S. Ct. 1168 (2019); *Legato Vapors, LLC v. Cook*, 847 F.3d

825 (7th Cir. 2017); *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016); *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362 (6th Cir. 2013); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom*.

For example, the Eighth Circuit has invalidated a Minnesota statute regulating the production of power imported into the State, emphasizing that the Supreme Court has never limited the holding of the extraterritoriality doctrine to price-control and price-affirmation laws. *Heydinger*, 825 F.3d at 920—22. Similarly, the Seventh Circuit struck down an Indiana law which imposed substantive requirements on the manufacture of e-cigarettes sold in the state, remarking that the statute "control[s] conduct beyond the boundaries of the state and tell[s] out-of-state companies how to operate their businesses. *Legato*, 847 F.3d at 834. And the Sixth Circuit has invalidated a law requiring beverage companies to stamp bottles sold in Michigan with a mark unique to such "only in Michigan" bottles on the ground that the law had an "impermissible extraterritorial effect" because it controlled "conduct beyond the State of Michigan." *Snyder*, 735 F.3d at 375—76.

Under these precedents, as under *Christies* and *Daniels Sharpsmart*, the only question is whether a State's sales prohibition does in fact regulate out-of-state conduct. And Proposition 12 does so: Its "practical effect," *Healy*, 491 U.S. at 336, is to regulate transactions regarding the production and sale of pork, veal, and eggs that take place entirely outside California. Indiana, for example, is the nation's fifth largest pork producer. *See* Nat'l Pork Bd., *State Rankings by Hogs and Pigs Inventory* (Jun. 14, 2018), https://www.pork.org/facts/stats/structure-and-productivity/state-rankings-by-hogs-and-pigs-inventory/. The agricultural supply chain leading from Indiana and other States to California requires multiple transactions occurring wholly in other States—such as farm procurement and production, sale to distributors, and slaughter and packing (followed by sale to California retailers and ultimately consumers). Proposition 12 requires farmers in other States to comply with California's regulations if their veal, pork, or eggs are re-sold in California. That requirement violates the Commerce Clause.

What is more, sometimes these transactions are undertaken by States themselves. For example, Purdue University—an instrumental-

ity of the State of Indiana—owns and operates farms through the Animal Sciences Research and Education Center (ASREC) that confine animals, including swine and poultry, in conditions that do not comply with Proposition 12. Purdue then sells livestock to distributors (including Tyson Foods) who in turn sell to retail customers nationwide. *See generally* Brian Ford, Purdue College of Agriculture, *Swine Unit*, https://ag.purdue.edu/ansc/ASREC/Pages/SwineUnit.aspx. Purdue's commercial transactions with those wholesalers occur wholly outside California, but may nonetheless be regulated by Proposition 12 unless the wholesalers choose to forego the California market altogether. That same model of interstate regulation will be replicated over and over as to private and public farms in Indiana and other states. Proposition 12 thus requires other States' farmers—and indeed, other States—either to overhaul their manner of pork production to comply with California's regulations or lose access to the enormous California market.

II. Proposition 12 Threatens State Sovereignty

The district court's interpretation of the Commerce Clause permits States to impose *any* regulation on *any* out-of-state conduct, so long as such regulations are nondiscriminatory and are somehow connected to

in-state sales. This threatens other States' decisions *not* to impose burdensome animal-confinement requirements on their farmers—a determination just as legitimate as California's. The Commerce Clause does not permit such usurpation of other States' policy choices.

In *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018), this Court correctly recognized that a State cannot insulate a statute from the extraterritoriality doctrine by purporting to regulate solely in-state activity—such as medical waste generation or sales—when that regulation has the direct effect of regulating conduct that takes place wholly outside of the State. If courts allowed States to evade the extraterritoriality doctrine by attaching production regulations to in-state sales, States could adopt numerous mutually contradictory statutes; the inevitable result would render interstate commerce effectively impossible. This is not what the Founders intended. This Court has the opportunity to vindicate the Founders' design and reign in the emerging Balkanization of the American agricultural market.

Proposition 12 threatens to interfere with "the legitimate regulatory regimes of other states," *Healy*, 491 U.S. 324, 336 (1989), and threatens to subject farmers across the country to conflicting requirements.

The vast majority of States have chosen to permit farmers to raise calves, hogs, and hens in accordance with commercial standards and agricultural best practices rather than impose specific animal-confinement requirements. *See generally* Elizabeth R. Rumley, The National Agricultural Law Center, *States' Farm Animal Confinement Statutes*, https://na-tionalaglawcenter.org/state-compilations/farm-animal-welfare/. It is easy to imagine farmers getting caught in the crossfire as other States attempt to impose regulations that differ from California's—a problem that will only get worse as other States attempt to impose their own extraterritorial regulations.

Nor is the concern of balkanization through conflicting laws speculative. Massachusetts, Maine, Michigan, and Rhode Island have enacted animal-confinement laws similar to California's current rules (which require farmers to refrain from "confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely," Cal. Health & Safety Code § 25991(e)(1)). *See* Mass. Gen. Laws ch. S51A, §§ 1–5; Me. Rev. Stat. tit. 7, § 4020(2); Mich. Comp. Laws §287.746(2); 4 R.I. Gen.

Laws. § 4-1.1-3. Massachusetts has a sales ban nearly identical to Proposition 12, in effect as of 2017, which applies not only to whole veal meat and whole pork meat but also to shell egg. Mass. Gen. Laws ch. S51A, § 3. It is plausible, now that Massachusetts and California have enacted sales bans on all agricultural products that do not comply with their animal confinement, that other States will follow suit.

The trend of individual States usurping other States' sovereign police powers is not limited to agricultural production methods. For example, Minnesota enacted a statute prohibiting the importation of power from outside the State from any new large energy facility, or entering into any new long-term purchase power agreement, that would contribute to or increase statewide power sector carbon dioxide emissions. *North Dakota v. Heydinger*, 825 F.3d 912, 920 (8th Cir. 2016). The Eighth Circuit affirmed an injunction against enforcing the statute, holding that Minnesota's law regulated "activity and transactions taking place *wholly outside* of Minnesota" in violation of the Commerce Clause. *Id.* at 921.

Such efforts portend exactly the sorts of economic friction and trade wars the Commerce Clause was designed to prevent. It is not hard

to imagine, for example, a state like California obstructing access to its markets for goods produced by labor paid less than $15 per hour—the hypothetical "satisfactory wage scale" dismissed as absurd in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)—only to face retaliation from other states implementing their own sales bans on goods produced by labor lacking right-to-work protections.

Nor is the substantial burden on regulatory autonomy as hypothetical as Defendants, Defendant-Intervenors, or the district court suggest. Proposition 12 requires the California Department of Food and Agriculture to promulgate rules for implementing the statute's requirements. Cal. Health & Saf. Code § 25993(a). While it has not promulgated the final version of these rules, the July 22, 2020, draft rules would require "any out-of-state pork producer that is keeping, maintaining, confining, and/or housing a breeding pig for purposes of producing whole pork meat for human food use in California [to] hold a valid certification" as "a certified operation." Cal. Dep't of Food and Agric., Draft Art. 5., § 1322.1(b) (Jul. 22, 2020), https:// www.cdfa.ca.gov/ahfss/pdfs/Article5CertificationDRAFT07222020.pdf. To receive a certification, a farmer must per-

mit on-site inspections by a "certifying agent and authorizing representatives of the Department." *Id.* Thus, to sell their products in the California market, States and their farmers not only would need to comply with California's regulatory scheme, but would also need to permit annual inspections by California officials.

These proposed regulations would also require all certified operators to retain and maintain Proposition 12 compliance records for two years. *See id.* at § 1322.5. The records must be maintained according to the regulation's standards and must be turned over to California auditors upon request.

In sum, California intends to force farmers around the country to comply with the full-scale regulatory apparatus of both their home State and that of California's, under penalty of being excluded from the latter's market. Indeed, this will also compel other States and their institutions—such as Purdue University—to submit to California audits, inspections, and record-keeping requirements.

Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, observed that "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory;

and try novel social and economic experiments *without risk to the rest of the country*." 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added). But here, as in other so many other instances arising throughout the Nation, one State's policy experimentation *does* pose risks for the rest of the country, and in particular for States who have made the legitimate decision not to regulate animal confinement as California has. Indeed, California's policies *prevent* other States from experimenting with policies of their own. The Court should refuse to allow California to supersede other States' sovereign policymaking authority.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,813 words.

Dated: September 30, 2020

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I certify that on September 30, 2020, I caused service of the foregoing brief to be made by electronic filing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all parties with an email address of record, who have appeared and consent to electronic service in this action.

Dated: September 30, 2020

/s/ Thomas M. Fisher
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